IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 746 OF 1999

WITH

CRIMINAL APPEAL NO. 681 OF 1999.

Criminal Appeal No. 746 of 1999.

Bhushan Narayan Redkar..... ..... Appellant.
(Orig.Accd.No.1)

V/s

The State of Maharashtra .... Respondent.

Mr.U.S.Vanjara, Adv. For the appellant.

Mrs.V. R. Bhosale, APP for the State.

Criminal Appeal No. 681 of 1999.

Suhas @ Subhash D. Naik @ Vijay Vinayak Shinde ..... Appellant.
(Orig.Accd.No.2)

V/s

The State of Maharashtra. .... Respondent.

Mr. S.V. Marwadi, Adv. for the appellant.

Mrs.V. R. Bhosale, APP for the State.

CORAM: V.G. PALSHIKAR
AND
SMT.NISHITA MHATRE, JJ.

3rd May, 2005.

Oral Judgment: (**Per Palshikar, J**)

Both these two appeals are directed against the judgment and order of conviction in Sessions Case No.1268 of 1996.

2. With the assistance of the learned counsel appearing for the appellants and the learned Additional Public Prosecutor for the State we have perused the entire evidence and reappreciated the same both oral and documentary as available on record.

3. The prosecution story as revealed on reappreciation of evidence stated briefly is that on 22.6.1996 two persons visited the flat one Dilip Walecha around 8.15 in the morning and when they were so waiting for Dilip, his wife and two others left the place. When they reached downstairs they were informed by the Watchman that there was some cracking noise probably from the wiring and therefore they rushed to the flat of Dilip. At that time two persons seen running from the compound of the building where flat of Shri Walecha was located were apprehended by the people. The wife of Dilip who is examined as P. W. 1 went back to the flat to find her husband Dilip was shot and declared dead in the hospital where he was reached for treatment. Accordingly complaint was lodged and after investigation the appellants in the two above appeals along with two others were prosecuted for conspiring to murder Dilip and factually murdering him after committing criminal trespass in his house with the intent to commit murder. The learned trial Judge on appreciation of prosecution evidence which consisted of 17 witnesses and several other documents came to the conclusion that the prosecution has failed to prove the guilt against accused Nos.3 and 4 but found accused Nos.1 and 2 guilty for the offences punishable under section 302 read with section 34 as also under section 449 read with section 34 of Indian Penal Code and convicted them to suffer rigorous

imprisonment for murder and further rigorous imprisonment for seven years for trespassing. Both the sentences were ordered to run concurrently. It is this order of conviction and sentence which is separately challenged by both the accused in the above mentioned two appeals. We have to consider the submissions made by the learned counsel claiming acquittal on the ground of failure of the prosecution to connect the accused with the crime. It was also contended that there are gross discrepancies in the prosecution. There is total failure to prove that the accused have done it. The learned public prosecutor however tried to defend the judgment by pointing out that there was adequate cogent evidence to support the order of conviction. We will consider both the submissions in the light of evidence reappreciated earlier with the assistance of the learned counsel for the accused as also for the prosecution.

4. P.W. 1 – Hema is the wife of deceased Dilip. She was in the house on 22.6.1996 when P.W. 2 – Kishor Bhoir and P.W. 3 – Dinesh Bhanushali came to meet Dilip. At that time Dilip was taking bath therefore P.Ws. 2 and 3 were asked to sit and one Chhotu, servant in the house of Dilip Walecha was asked to serve them water and tea, when Chhotu tried to do so he found that two more persons were waiting. He accordingly told P.W. 1 – Hema that there are four persons and not two. He was therefore asked to give water to all. P.W. 1 – Hema wanted to go to temple and therefore started after telling Dilip who had just come out of bath that she was going for pooja in the temple. She was accompanied by P.W. 2 while P.W. 3 had gone to answer the nature' scall. When they reached ground floor they were informed by the watchman that there was some cracking noise from above and one

of them therefore went up followed by P.W. 3 to see as to what had happened. P.W. 3 came back shouting that Dilip is injured, P.W. 1 therefore went back, saw the victim injured and bleeding, tried to save him but failed. She has also deposed that after the security man told her that there was some crackling noise and P.W. 3 came and told her that there was some trouble in the flat she saw the unknown persons trying to hire a cab she therefore shouted “Pakdo, Pakdo” and the persons nabbed those persons who were running away. The witness then went back to the flat where she saw the victim lying in the chair and saw Chhotu trembling and hiding behind the refrigerator. The witness has been cross examined in extenso and has categorically stated that the incident occurred between 8.00/8.15 in the morning on 22.6.1996. P.W. 2 – Kishore Bhoir is an Estate Agent who has stated that he had gone to the resident of the deceased at about 8.30 a.m. On 22.6.1996 and was told to wait as Dilip the victim had gone for bath. He then saw P.W. 1 coming out of house for going to temple. He claims to have accompanied P.W. 1 to the ground floor. He also saw two persons running away who were caught by people around. He has however failed to identify the accused persons in the Court.

5. P.W. 3 – Dinesh Bhanushali is other person accompanying P.W. 2 Kishore who claims that they visited the flat of the victim Malbar Apartments at about 7.45 a.m. and when they were so waiting two other persons came and enquired about Dilip Walecha. He speaks of two other persons coming in and one of them introducing himself as Rajesh Wagela from Kashimira. This according to witness occurred in the presence of P.W. 2. However P.W. 2 does not mention any such talk by said Rajesh Wagela from Kashimira. Then according to this witness P.W. 1

came out of the house and told him that she is going to the temple, P.W. 2 therefore accompanied her and P.W. 3 who was there went for urination. He then heard P.W. 1 shouting “Mar Diya, Mar Diya” and then saw two persons trying to run away in a cab, they being chased and caught hold of by people including police constable. Witness then says that the victim was taken to the hospital and was declared dead on admission.

6. It will thus be seen that all the three witnesses i.e. P.Ws. 1 to 3 claim that they were present at the time when incident occurred. Each of them claims that they did not see the incident, each of them claim that they saw the accused running away, each of them states that the accused were apprehended by people right there and that they went back to the flat where Dilip was discovered in an injured condition with bleeding injury and was taken to the hospital where he was declared dead. All these witnesses insist that the incident has occurred between 8.00/8.30 a.m. on that day. P.W. 3 however says that he arrived at 7.45 a.m. Along with P.W. 2. Whatever be the exact timing as stated witnesses all the three read together do state that the incident occurred between 8.00/8.30 a.m. On 22.6.1996. However P.Ws. 2 and 3 do not speak anything about Chhotu serving them tea or Chhotu introducing of two other new persons arrival. However P.W. 1 has very categorically stated that Chhotu was seen by her behind the refrigerator in frightened state when she discovered that the victim was shot by some persons. Surprisingly this servant Chhotu has not been examined by the prosecution.

7. P.W. 4 – Gopalkrishna Gaonkar is the police constable was on duty at

Simla House police chowki when around 8.00/8.30 in the morning he was standing at the door of the chowki he heard shouts from Malbar apartments and went towards the gate of the building. He saw two persons hurriedly leaving the building, both of them armed with revolvers and were shouting “Bajoo Hato, Bajoo Hato”. They ran towards Hyderabad Estate and the witness along with his colleague chased him. The witness stayed behind and learnt that the persons running away were apprehended with arms. The statement of the witness was recorded around 8.00 a.m. And on the very day. Other witnesses' statement was recorded on the same day. It does not contain any mention about his staying away. The Police Inspector who recorded statement about what happened at the Chowki, about the accused shouting “Bajoo Hato, Bajoo Hato” and in cross examination further goes to say that he did not see anybody chasing accused persons. It is a fact that the accused persons were apprehended. P.Ws. 1 to 3 insist that they were apprehended by people and police, yet P.W. 4 says that he did not see anyone chasing the accused.

8. P.W. 5 – Anil Yeran is another police constable who was on duty around 8.00 a.m. In the morning on 22.6.1996 when he saw two persons running out of Malbar Apartments and watchman and public were shouting “Pakdo, Pakdo”. The accused persons tried to board the taxi but failed and started running towards Hyderabad Estate where he chased them. Then according to witness they got into a taxi bearing No.MRO-7569 and he got into following taxi and chased them. According to this witnesses he continued to chase accused persons who were in a taxi, he stopped the taxi, two other colleagues Jagtap and Bhand came in police van near Sheetal Baug society and took charge of the persons in the taxi along with bag

in the hand of one of them and brought them to the police chowki. According to this witness when they reached police station after apprehending the accused it was around 8.30/8.45 a.m. He does not speak of seeing the accused running with guns in their hands which P.W. 4 does mention. He speaks of chasing them by taxi as they were running away in another taxi. He speaks of apprehending them near Sheetal Baug society, taking the bag containing gun in their hands and taking them to police station. All this is not deposed by P.W. 4 who continued at the chowki. P.W. 4 at one place has stated that he went to the hospital with the injured and then he states that he was told by the officer to remain in police chowki where he was informed half hour afterwards that the culprits have been caught armed with revolvers. He then went to the police station where he found the accused along with P.W. 5. It is thus not certain as to what exactly occured from their evidence. Both are police constables, one says that they were running towards Hyderabad Estate the other says that they were so running away in a taxi, he got into another taxi and chased the taxi which was stopped near Sheetal Baug society from where the accused were apprehended and taken to the police station. None of these witnesses i.e. None from P.Ws. 1 to 4 state that the accused at any point of time got into taxi. In fact P.Ws. 1 to 3 insist that the accused persons were apprehended when they were trying to run towards Hyderabad Estate. If this statement of these three witnesses is to be accepted then the entire testimony of P.W. 5 becomes extremely doubtful and therefore unacceptable. Obviously if his statement is to be accepted then the statement of P.Ws. 1 to 3 becomes unreliable.

9. P.W. 6 – is Jagtap the other police official whom P.W. 5 mentions is one

person along with him. He deposes that around 8.30 a.m. On 22.6.1996 one taxi bearing No.7569 halted near the police station, P.W. 5 was sitting in it and he shouted at the witness informing him that in the taxi two persons armed were escaping and sought help of the witness who then sat in the police van and followed the said taxi and it was intercepted by the police van near Sheetal Baug society. He then claims that he caught hold of the accused persons and took them to the police station.

10. It will thus be seen that according to P.W. 6, P.W. 5 gave him call for help and he and the other police constable followed the taxi bearing No.7569 and ultimately apprehended the accused in front of Sheetal Baug society with the help of P.W. 5 who was already in a taxi. This witness has specifically stated in answer to the question that these unidentified persons at that time were involved in assault by fire of one Dilip Walecha in Malbar Apartments. However in cross examination he states that he was not aware of the incident before he got information to chase these persons. He did not receive any call regarding that and says that he heard about murder of Walecha but came to know of it only when he returned with those two accused persons about the murder of Walecha. According to these two witnesses therefore the accused were running away from Malbar Apartments, they were chased, apprehended by P.W. 5 in the taxi, the taxi intercepted by P.W. 5 going in another taxi and P.W. 6 Jagtap going in police van, accosting took place around Sheetal Baug society and the accused were brought to the police station. It was then that P.w. 6 came to know of firing on Walecha. The deposition of these two witnesses, if accepted, would therefore reveal that the accused persons were

running away in a taxi and they were apprehended in a taxi, the guns were in a bag in that taxi. This situation as deposed to by these two witnesses is exactly contrary to what has been stated by P.Ws. 1 to 3, when they say that the accused persons were trying to run away and were apprehended before them boarded in the taxi. The prosecution has failed to answer as to which two of the persons were exactly murderers and whether they were two who were seen running by P.Ws. 1 to 3 apprehended by the police and people before they got into taxi or those two whom P.W. 5 chased in a taxi who were running away in a taxi, followed by P.W. 6 in police van and apprehended in front of Sheetal Baug society by P.Ws. 5 and 6. There is no explanation whatsoever coming forth from the prosecution regarding exact identity of the persons leaving the scene of offence and those who were apprehended in front of Sheetal Baug society. Yet the learned Judge has found that the story of interception as put forth by P.Ws. 5 and 6 is liable to be accepted. If this is accepted then the entire testimony of P.Ws. 1 to 3 becomes liable for rejection as according to them the accused persons then unidentified were nabbed before they alighted in the taxi whereas the accused persons were nabbed according to P.Ws. 5 and 6 from the taxi.

11. P.W., 7 – Mohd. Khan is driver of the taxi in which P.W. 5 chased the accused persons. He says that it was at 7.30 a.m. When two persons came sat into a taxi and wanted to go towards Churchgate and when they i.e. The taxi driver and two persons were near Teen Bati at Malbar Hill two constables intercepted them, sat in the cab and directed them to go to police station. He deposes that he was sitting in police station till 5.00 in the evening. He does not say anything about his taxi

being stopped by the police van. He speaks nothing about Jagtap getting in from police van. He speaks of accused persons being occupants of his taxi when he was intercepted by P.W. 5 and was asked to go to police station. The deposition of this witness creates further confusion as to what exactly transpired in the matter of arrest of two unidentified (then at the time of incident) persons whether accused persons were apprehended by people and police before they got into a taxi or whether they got into taxi and were chased by P.W. 5 in another taxi and apprehended with the help of P.W. 6 going in police van near Sheetal Baug society or as according to P.w. 7 taxi driver of taxi No.7569 persons were already occupying his taxi and wanted the taxi to go to Churchgate when two constables P.Ws. 5 and 6 intercepted the taxi got into it and directed the taxi to go to police station. There is this confusion in abundance regarding what exactly transpired between 8.00/8.30 a.m. On 22.6.1996 as to who were the unknown persons, where they were intercepted, how the guns were seized.

12. To add to this confusion then we have P.W. 8 – Mohd. Ansarulla Khan who is another taxi driver who was driving taxi No.MRK-3710 and who says that one constable came and sat in his taxi and wanted to overtake another taxi. He states that he therefore chased the taxi No.7569. However according to P.W. 5 the accused boarded taxi No.7569 and he followed them in another taxi of which he does not state the number. It is thus not certain as to how the accused were apprehended by the police. It is not certain whether they were apprehended by the police only and or by police and people and or apprehended by only people.

13. Then there is evidence of P.W. 9 – Vijay Kadam another police official who states that at about 8.00 a.m. he received information about receipt of a call from P.W. 5 that he was chasing two persons in a taxi, they were armed and he should follow them. Near Teen Bati he saw police van coming and therefore came back and in the van there were two persons who were taken to police station. He is witness to the seizure of the arms in the police station from accused persons. This according to witness therefore occurred somewhere between 8.00/8.30 a.m. The mention of P.Ws. 1 to 3 is that the assault took place between 8.00/8.30 a.m. How all this can transpire within few minutes is therefore another confusing aspect which is not clarified by the prosecution.

14. Then there is evidence of police inspector Choudhary who is the investigating officer. According to him it took three hours to complete the panchnama, when he entered the cabin he saw revolvers were in possession of P.Ws. 5 and 6. He has not seized them from the accused. P.W. 11- Ajit Ranade is a photographer, P.W. 12 – Gangaram Shinde is the pancha who made the panchnama about flat where death occurred. P.W. 13 – is Dr. Umesh Patil who proved homicidal death. P.W. 14 – Sudan Jadhav is the person who held identification parade. P.W. 15 – Shankar Kshirsagar speaks of communication received by him from the deceased claiming protection from gangster Suresh Pujari. However there is no evidence on record to link this Suresh Pujari with the accused persons. He is not a accused, he is also not amongst the accused who have been acquitted. P.W. 16 – Arutala Rao is firearm expert. It is this state of evidence which is accepted by the learned trial Judge by coming to the conclusion of guilt and has sentenced the

accused persons accordingly.

15. In our opinion the judgment of the conviction is unassailable in law and on facts as they are proved on record by the prosecution. The prosecution has failed to prove that the persons whom P.Ws. 1 to 3 saw running away and were accosted within their site by some police officials and the public were the same as those arrested by P.Ws. 5 and 6 in front of Sheetal Baug society by a chase in a taxi and police van. P.Ws. 1 to 3 do not speak of seeing any weapon in the hands of any of the accused persons whom they saw running away, whereas P.W. 4 speaks of the persons running using guns and saying “Bajoo Hato, Bajoo Hato”.

16. Even if the evidence of the police is to be accepted regarding recoveries of guns then there is no explanation why the guns were not examined for finger prints and why there was no attempt to match the finger prints on the guns with those of the accused, as it could have proved beyond doubt the handling of the guns by the accused though the prosecution has proved user of gun for killing the victim. In the absence of this vital evidence and the confusion which arises between the testimony of P.Ws. 1 to 3 on one side and P.Ws. 4 to 6 on the other side it is impossible to reach to a conclusion that it is the accused persons only who committed the murder of Dilip Walecha.

17. In our opinion, the investigation in this case was conducted in very slipshod manner. Important evidence of finger printing, proving the same was not obtained and produced before the Court. There is no certainty of identification of the

witnesses. There is time lack in the deposition and if these aspects are considered in its entirety minimum that can be said is that the prosecution has failed to prove beyond reasonable doubt the implicitly of these two persons the appellants in the crime.

18. It is further interesting to note that though the prosecution claims to have seized the guns from the persons of the accused persons the accused persons were charged under the Arms Act but the charge was not pressed. Reason why the charge was not pressed is not forthcoming. The very fact that the charge was not pressed despite it being framed, P.Ws. 5, 6 and the investigating officer giving up the charge creates serious doubt in the veracity of the statement of these persons. That being the situation the prosecution cannot be said to have proved beyond reasonable doubt the implication of these persons.

19. Yet another aspect;t of importance is the fact that the accused Nos.3 and 4 are acquitted. One of them was name by P.W. 3 as the person who introduced himself as Wagela. What happened to this Wagela is not known. In fact Wagela is an accused person. Though Wagela was named as person visiting the spot along with another person at the time when Dilip Walecha was shot as deposed by P.W. 3, Wagela is not traced out or examined nor anything is put on record as to what happened to this person when according to P.W. 3 he was present. There is no evidence whatsoever in relation to accused Nos.3 and 4 who have been acquitted. That being the position what was the motive for the present appellants to

commit murder of victim becomes a matter of confusion. There is evidence on record to show that the victim Dilip Walecha had an apprehension and threat allegedly received from Dinesh Pujari gang. There is therefore no question of any of the accused having any motive to shoot the victim. There is thus serious infirmity in the prosecution case.

20. Third aspect which must be noted as the failure on the part of prosecution is its inability to examine Chhotu who according to P.W. 1 was present when the firing took place and was behind the refrigerator and when she discovered that her husband was dead. That Chhotu was an employee of the victim, he could have been traced, atleast some evidence could have been brought on record to show that such attempt was made. Nothing of the kind is done. That is why we are constrained to observe as done earlier that the entire investigation is conducted in a slipshod manner. The prosecution evidence is in the state what it is, as observed by us and in such circumstances it becomes highly improbable to accept the evidence as adequate for convicting the two persons under section 302 of Indian Penal Code. That homicidal death has occurred is proved and yet police have failed to prove or bring to books real offenders. In the circumstances we are constrained to hold that the prosecution has failed to prove that the present appellants are persons who fired vital shot in the body of Dilip Walecha and therefore they are liable to be given benefit of doubt and are required to be acquitted for lack of prosecution' sefforts to bring the real guilty to justice. In the result therefore the appeals succeed and are allowed. Both the accused-appellants are liable to be released if not required in any other crime.